

**IN THE U.S. DISTRICT COURT FOR MARYLAND,
SOUTHERN DIVISION**

BEYOND SYSTEMS, INC.)	
)	
Plaintiff)	
v.)	Case No. PJM 08 cv 0921
)	
WORLD AVENUE USA, LLC, et al.))	
Defendants)	
_____)	

**THIRD PARTY PLAINTIFF WORLD AVENUE USA, LLC’S UNOPPOSED MOTION
FOR LEAVE OF COURT TO FILE SUR-REPLY TO THIRD PARTY DEFENDANTS’
REPLY IN SUPPORT OF THEIR MOTION TO QUASH SERVICE OF PROCESS**

Third Party Plaintiff WORLD AVENUE USA, LLC (“World Avenue”), pursuant to Local Rule 105(2)(a), hereby respectfully requests the permission of the Court to file a Sur-Reply Memorandum to the September 29, 2009 Reply of Third Party Defendants JOSEPH WAGNER (“Wagner”) and HYPERTOUCHE, INC. (“Hypertouch”) In Support of Their Motion to Quash Service of Process [see DE 111, 106] (“Reply”), and respectfully states as follows:

1. Third Party Defendants Wagner and Hypertouch originally filed a Motion to Quash Service of Process,¹ and attached a Declaration from one Lisa FitzGerald Wagner, wife of Wagner, who claimed that the Return of Service named her five-year old daughter as the party served. See DE 106. Wagner and Hypertouch provided no other details or evidence relating to the proof of service.

2. World Avenue responded, submitting the Declarations of two process servers, Leonard Leavitt and Thomas Cabral, the public records of the United States Postal Service attesting to the forwarding address for Wagner and Hypertouch, and the public records of the State of California and the Commonwealth of Massachusetts, among other evidence. See DE

¹ Although styled a Motion to Quash Summons, the Motion is in substance a Motion to Dismiss for insufficiency of service of process under Federal Rule 12(b)(5), and should be treated as such.

107, Ex. 1-4, 7.

3. In their Reply filed September 29, 2009, Third Party Defendants submitted the Declaration of one Shirley FitzGerald as a *new* basis for dismissal based on insufficiency of service of process. *See* DE 111. Shirley FitzGerald is a relative of both Wagner and the first declarant, Lisa FitzGerald Wagner. *Id.* She was well aware that she was served with process. *Id.* Third Party Defendants could have submitted the Declaration with their Motion, but instead withheld the facts until no Sur-Reply could be filed. *See* L.R. 105(2)(a) (“Unless otherwise ordered by the Court, surreply memoranda are not permitted to be filed”).

4. In the interests of justice, Third Party Plaintiff should be permitted to file a Sur-Reply to address *new* evidence in support of the Motion that was not originally filed with the Motion. *See, e.g., Barrera v. Getty*, Case No. PJM 08-3347, 2009 WL 2499381, at *1, *1 (D. Md. Aug. 13, 2009) (Messitte, J.) (granting motion to file sur-reply).

5. A copy of the proposed Sur-Reply is attached hereto as Exhibit “A”.

6. Third Party Plaintiff’s counsel has conferred with counsel for Third Party Defendants, and counsel for Third Party Defendants has indicated that he does not oppose the relief set forth herein.

WHEREFORE, Third Party Plaintiff WORLD AVENUE USA, LLC respectfully requests leave of Court to file the Sur-Reply of record.

Dated: October 7, 2009.

Respectfully submitted,

Attorneys for World Avenue USA, LLC

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--and--

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